United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

74-2245

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELIOT FRANKEL,

Petitioner,

- v -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Docket No. 74-2245

SUPPLEMENTAL BRIEF FOR RESPONDENT

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

THOMAS H. DELOTT,
Special Assistant United States Attorney

STEVEN J. GLASSMAN,
Assistant United States Attorney

Of Counsel

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74-3047

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

ERNEST FRANCIS,

Petitioner,

- v -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

- -x

Docket No. 74-2245

SUPPLEMENTARY BRIEF FOR RESPONDENT

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Respondent

THOMAS H. BELOTE,
Special Assistant United States Attorney

STEVEN J. GLASSMAN,
Assistant United States Attorney

Of Counsel

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EVEN THOUGH AN ALIEN HAS BEEN A PERMANENT RESIDENT FOR MORE THAN SEVEN YEARS, HE IS STATUTORILY INELIGIBLE FOR DISCRETIONARY RELIEF UNDER SECTION 212(c) OF THE ACT AT A DEPORTATION PROCEEDING BECAUSE HE HAS NOT VOLUNTARILY DEPARTED FROM THE UNITED STATES SUBSEQUENT TO HIS BECOMING DEPORTABLE.

As discussed more fully in the briefs of both the petitioning alien and the Government discretionary relief under the Seventh Proviso to Section 3 of the Immigration Act of 1917 was broadly administered by the Board of Immigration Appeals in order to afford relief to various categories of aliens threatened with expulsion from the United States. Thus, in Matter of A 2 I & N Dec. 459 (B.I.A. 1946), relief was afforded to an alien who had committed a deportable offense subsequent to his entry. He was therefore permitted voluntary departure, pre-examination and the advance exercise of Seventh Proviso to waive the ground of exclusion arising from his conviction. The Board determined that nothing contained in Section 19 of the Immigration Act of 1917 prevented the grant of voluntary departure, and further

that Seventh Proviso discretionary relief was available in the then existing system of pre-examination.

As a result of the studies which preceded the enactment of the Immigration and Nationality Act of 1952 (see p. 8-9 of Respondent's brief) Congress adopted Section 212(c) of the Act which contained provisions restricting the application of similar discretionary relief. (In enacting the 1952 Act Congress was aware of various loopholes and lax practices arising under prior immigration statutes. H.R. No. 1365, 82d Cong., 2d Sess. 1678 (1952) Specifically, Section 212(c) contained the requirement that an alien must have "temporarily proceeded abroad voluntarily and not under an order of deportation". Simultaneously, Congress enacted Section 241(a)(11) relating to the deportation of narcotics offenders and Section 244(e) of the Act which precluded an alien, deportable by virtue of Section 241(a)(11) from eligibility to depart voluntarily from the United States in lieu of deportation*.

*Subsequent amendments to the Act of 1952 were adopted which clearly subject the alien herein to the full force and effect of mandatory deportation under Section 241(a)(11) of the Act. See Bronsztenjn v. I.N.S., F.2d (2d Cir., Docket No. 75-4060 decided December 2, 1975.)

Nonetheless, in an apparent effort to afford eligibility for discretionary relief to as many aliens as could qualify under the clear terms of Section 212(c), the Board liberally construed its provisions. That construction thereby afforded eligibility for relief in deportation proceedings as well as exclusion proceedings if he left and re-entered the United States prior to the institution of immigration proceedings. Matter of G A 7 I & N Dec. 274 (B.I.A. 1956). The Board also decided that Section 212(c) did not require an "entry" as described under Rosenberg v. Fleuti, 374 U.S. 449 (1963) in order to qualify for eligibility under that provision. Matter of Edwards, 10 I.& N Dec. 506 (B.I.A. 1964). Further, the Board construed the section as applicable to an alien eligible for adjustment of status pursuant to Section 245 of the Act despite the fact that the alien did not physically proceed abroad following the conviction which rendered her deportable. Matter of Smith, 11 I & N Dec. 325 (B.I.A. 1965).*

*Judicial affirmance of this interpretation was not reached in Arias-Uribe v. Innigration and Naturalization Service, 466 F.2d 1198, 1199, N. 3 (9th Cir. 1972).

Despite these interpretations the clear language of Section 212(c) precludes relief to aliens, such as the petition here and the petitioner in Arias-Uribe, supra., who are not returning residents and are statutorily ineligible for voluntary departure under Section 244(e) of the Act, and adjustment of status pursuant to Section 245 of the Act.

THE PETITIONER'S FAILURE TO QUALIFY AS A MEMBER OF A CLASS DETERMINED BY CONGRESS TO BE ELIGIBLE FOR DISCRETIONARY RELIEF DOES NOT DEPRIVE HIM OF ANY RIGHTS UNDER THE FIFTH AMENDMENT.

It is respectfully submitted that Congress has the power to exclude any and all aliens from the United States, and to prescribe the terms and conditions on which they may enter or on which they may remain after having been admitted (see Respondent's brief p. 15-16). This power to determine which classes of aliens may remain in the United States has been repeatedly affirmed by judicial decision. Despite the petitioner's assertions, the decisions of Almeida-Sanchez v. United States 413

U.S. 266(1973) and United States v. Brignoni-Ponce, U.S. , 45 L. Ed. 2d 607 (1975) do not attempt to circumscribe that Congressional authority.

The petitioner herein, by the express language of Section 212(c), Section 244(e) and Section 245 of the Act, does not belong to any class of aliens which the Congress has deemed eligible for discretionary relief. Despite the harshness of this classification he has been treated similarly to all other aliens belonging to the class of Western Hemisphere aliens who are ineligible to depart voluntarily from the United States, and who are not returning residents as required by Section 212(c) of the Act. The petitioner's present ineligibility for relief arises from the distinct, yet permissible, treatment Congress has afforded to Western Hemisphere aliens and deportable narcotics offenders. The statutory provisions relating to these categories of deportable aliens have been previously upheld by the Courts, Dunn v. Immigration and Naturalization Service, 499 F.2d 856 (9th Cir. 1974); Oliver v. Immigration and Naturalization Service, 517 F.2d 426 (2nd Cir. 1975), and havewithstood attacks premised upon the Fifth Amendment.

The petitioner's inability to meet the requisite statutory criteria in this case is analogous to other instances where aliens have been barred from relief under other provisions of the Act of 1952. In these comparable situations the Courts, and the Attorney General in overruling the Board of Immigration Appeals, have upheld the classifications and statutory distinctions adopted by Congress in its power over matters relating to immigration. See Leng May Ma v. Barber, 357 U.S. 185 (1958); Matter of DeF _____, 8 I & N Dec. 68 (1959). It is within the Congress' authority to create classifications relating to aliens seeking discretionary relief. The limited availability of discretionary relief here reflects the harsh but rational treatment afforded narcotics offenders under the Immigration and Nationality Act. The fact that the Board of Immigration Appeals has been as liberal as possible in construing the provisions of this discretionary relief, see Matter of G A _____, supra, should not detract from the rationality of the overall classification made by the Congress. The petitioner herein has failed to meet the statutory

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requirements of Section 212(c). Nothing herein deprives him of any right or violates equal protection.

Dated: New York, New York

January , 1976.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

THOMAS H. BELOTE,
Special Assistant United States Attorney

STEVEN J. GLASSMAN,
Assistant United States Attorney

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 74-2245

State of New York)
County of New York) ss

Pauline P. Troia,
deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York, being duly sworn,

That on the
19th day of January, 19 76 she served a copy of the within supplementary brief for respondent

by placing the same in a properly postpaid franked envelope addressed:

Morton B. Dicker, Esq.,
Janet M. Calvo of counsel,
Legal Aid Society
11 Park Place,
NY NY 10007

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
19th day of January, 19 76

Ralph L. Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-2267838 Queens County
Term Expires March 30, 1977